MICHIGAN
LAW REVIEW

VOL. XIII. JUNE, 1915 No. 8

THE NATURE AND IMPORTANCE OF LEGAL POSSESSION.[a]

II.

TO impress these unfamiliar facts on our consciousness, so that we shall not lose sight of them during the rest of our discussion, so that we shall not slur them or cloud them by vague use of symbolic ideas or terms concerning property and title, let us repeat the essence of the legal situation. Jackson is the holder of a fee simple acquired tortiously. His title to that fee—*i. e.* the facts which would induce the courts upon occasion to give him the remedies "vindicating" the existence of this vested fee in him—consist in his actual exclusive use and control of Y (legally equivalent to occupation) plus his initiatory appropriation intent to hold Y as his own. Smith has no fee in Y. He is disseised. He has only a chose in action against Jackson to get back his fee through the prosecution of certain remedies. Jackson has not good title *to retain the fee* against a proper proceeding by Smith. Smith's title *to his remedies* against Jackson consists of the facts establishing his former legal possession, the fact of the disseisin by Jackson, the fact that Jackson is withholding the land from Smith, and the fact that there is no valid defense available to Jackson against this title.

Further facts of significant bearing on the theme of our discussion may be added. Jackson's efficient title to the present existence in his favor of legal possession and legal possessory rights, etc. consists abbreviately of his original unrevoked appropriation intent plus his use of Y. If he ceases to use Y and leaves it unenclosed, without the substitution of some other legal equivalent for use or occupation, he loses his legal possession of Y—his title to legal possessory rights, etc. in Y becomes defective, unless his cessation of use or control is such a temporary one as may be indicated vaguely,

[a] Continued from May number.

but not defined, by the label *transient and ordinary*.[40] That Jackson does not intend to abandon his claim or extinguish his rights, etc. is immaterial if there is a material break in the continuance of the adverse use or other physical control which is one of the essential elements of his efficient title. However openly and emphatically he asserts his claim and however persuasive his color of title, legal possession is not existent in his favor when this element of use, occupation, or equivalent control has been and continues lacking and the lack is not transient and ordinary. An adverse appropriation intent is also essential to the initiation of a disseising legal possession, and it is essential to the unimpaired continuance of such a legal possession that this adverse intent be not revoked.[41] If adverse legal possession ceases to exist, for whatever cause, legal possession immediately revests in the person who has "the best title" to get and hold it, without any material act, intent, or knowledge on his part.[42]

We are now to consider briefly what remedies Smith has to recover legal possession from Jackson. First, Smith may re-enter on the land and thus by self-help recover his legal possession. It is not difficult to understand that if he not only *enters* but *ousts the adverse holder,* legal possession is revested in him; but the ouster of his adversary is not necessary to the accomplishment of this result. If Smith enters on the land *during the continuance of his right of entry,* in open assertion of a claim to possession, seisin immediately accrues to him and the adverse seisin dissolves. If Smith who has entered and thus recovered seisin, leaves the land to the continued occupation of the adverse claimant, there results *ipso facto* a new disseisin without a fresh hostile act or claim by the adverse occupier, and although, perhaps, he is not aware that his occupation has been invaded and his legal possession interrupted.[43] In the fact that Smith may recover legal possession by ousting Jackson and remaining himself in exclusive occupation, there is nothing peculiar to

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[40] *Beasley, et al.* v. *Clark,* 102 Ala. 254, 14 So. 744; *Sharp* v. *Johnson, 22* Ark. 79; *Stephens* v. *Leach,* 19 Pa. St. 262; *Nixon, et al.* v. *Porter, et al.,* 38 Miss. 401; *Gist* v. *Beaumont,* 104 Ala. 347, 16 So. 20.

Compare: *Downing* v. *Mayes,* 153 Ill. 330, 46 Am. St. Rep. 896; *Susquehanna etc. Co.* v. *Quick,* 68 Pa. St. 189; *Keane* v. *Cannovan, et al.,* 21 Cal. 291; *Moon* v. *Rollins, et al.,* 36 Cal. 333; *Ewing* v. *Burnett,* 11 Pet. (U. S.) 41, 9 L. ed. 624; *Brumagin* v. *Bradshaw,* 39 Cal. 24; *Hussey* v. *McDermott,* 23 Cal. 413; *Murray* v. *Hudson,* 65 Mich. 670, 32 N. W. 889; *Black Warrior Coal Co.* v. *West,* 170 Ala. 346, 54 So. 200.

[41] *Bond* v. *O'Gara,* 177 Mass. 139; *Sailor* v. *Hertzog,* 2 Pa. St. 182.

[42] *Potts* v. *Gilbert,* 3 Wash. C. C. 475. See also cases in notes 40 and 41, *supra.*

[43] Co. Litt. 252a—254b and 245b; *Ingersoll, et al.* v. *Lewis,* 11 Pa. St. 212. Cf: *Bowen* v. *Guild,* 130 Mass. 121. See also Pollock and Wright, *Possession in the Common Law,* 78-81; Stats. 4 and 5 Anne, c 16, s 16; 3 and 4 Will, 4 and 1 Vict. c 28, secs. 10-11; *Randall* v. *Stevens, et al.,* 2 Ell. & Bl. 641; *Solling, et al.* v. *Broughton,* L. R. [1893] A. C. 556; Cal. Code Civ. Pro., §320; Wood, *Limitations,* § 270.

his legal powers and liberties, for anyone entirely without right may get legal possession in disseisin of Jackson by similar means. The peculiar and remedial powers and liberties of Smith lie in the facts (1) that *under a still existing right of entry,* he can revest his seisin by properly making an entry and claim, *without ouster of the adverse claimant and without interfering in any way with the actual adverse use or control of Y;* (2) that for the recovery of seisin by such an entry, whether or not it is followed by ouster of the adverse claimant, there is no legal liability; and (3) that the seisin so recovered may be retained in litigation against Jackson.

Upon the duration and exercise of a *right of entry* there are limitations. Under the English law of the time of Bracton, a right of self-help by re-entry soon expired. Under the older law only time enough to assemble one's friends and return and enter was permitted. This time limit afterwards became obsolete.[44] Even later in the medieval law of England, a right of entry was not good against the alienee of the disseisor unless "continual claim" had been made. This limitation also had become obsolete by the time of Lord Coke.[45] Similarly, if the disseisor died and his heir entered, the right of entry was "tolled by descent cast," unless continual claim had been made within a year and a day before death of the disseisor, or unless the case came within one of various exceptions to this rule.[46] This limitation upon the right of entry was modified by legislation and finally was abolished in England.[47] It has been abolished in many of our jurisdictions also. Statutes of limitations, such as that of 21 Jac. I, c. 16, and those of our American jurisdictions bar a right of entry after specified periods.

If the right of entry of Smith has expired in any way, his re-entry without ouster of the adverse possessor will not revest his legal possession nor terminate or interrupt the adverse legal possession. Furthermore, under such circumstances, a re-entry is a wrongful trespass upon the adverse possession, and, if accompanied by ouster, is a wrongful disseisin for which the usual remedies are available to the ousted adversary. This was so even if, as was the case under the old English law and under the statutes of some of our states, the person reëntering had unbarred remedies by action to

[44] Apparently in Bracton's time, while the right of entry still existed, the ousted owner was not completely disseised. Perhaps this means only that he was not put to his action against the disseisor until his period for lawful reëntry had expired. See 2 Pollock and Maitland, *History of English Law* (2nd ed.), 49-50; Maitland, *The Beatitude of Seisin,* 4 Law Quart. Rev. 286 et seq.

[45] Co. Litt. 237b.

[46] Litt. secs. 385 et seq.; Co. Litt. 237a et seq.

[47] See Stat. 3 & 4 Will. 4, c. 27, sec. 39; Cal. Civ. Code, § 327.

recover the land and therefore still could be called "owner"—*i. e.* still had good title to recover and hold the fee in litigation against all comers.[48]

Another limitation on the efficiency of a right of entry is set by the forcible entry and detainer statutes. These statutes forbid forcible entries, even by one who has a right of entry, and forcible unlawful detainers. Sometimes they contain definitions of what shall constitute a "forcible entry" or a "forcible detainer" within the meaning of the statute, and sometimes the scope of the statutory definition includes acts which do not constitute actual force. They provide special remedies for the person against whose interest in the land the acts committed have been rendered unlawful by the statute.[49] It generally is held that these statutes do not make a forcible entry under an existing right of entry a wrongful trespass, nor subject the person so recovering seisin to liability of losing it again through an action of ejectment or other ordinary remedy brought by the aggrieved ousted possessor. It is held that the title to make an entry and recover seisin is sufficient justification against any common law remedy exerted by the adverse possessor; but his special statutory remedy, under some of the forcible entry and detainer laws, if properly pursued, enables him to recover the land from the aggressor. He will then be unable to hold possession against a properly conducted suit to recover it brought by the better title holder; but he will have vindicated his special right against the forcible self-help of the title holder.[50]

In addition to the remedy of self-help, Smith has a remedy to recover possession of Y by suit against Jackson. Under the old English law, there were many forms of action for the recovery of possession. Each form was adapted to a limited range of circumstances. The remedies of an ousted termor for years were different in form from those of one disseised of a freehold estate; for the freeholder disseisee there were various alternative remedies; and there were a number of special forms of action to recover possession which would fit only a narrow class of cases for which they had been devised. The intricate details of the law concerning these obsolete forms of action—the writs of right, the formedons, the assizes, and the writs of entry—are matters of interest to the learned legal historian, and enmeshed in them can be found much of the

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[48] *Stokes* v. *Berry*, 2 Salk. 421; 3 Bl. Comm. 177.

[49] 2 Bl. *Comm.* 179; Cal. Code Civ. Pro. § § 1159-1179.

[50] *Beddall* v. *Maitland*, 17 Ch. Div. 174; *Beattie* v. *Mair*, L. R. 10 Ir. 208; *Canavan* v. *Gray*, 64 Cal. 5; *Cory* v. *Santa Ynez Land, etc. Co.*, 151 Cal. 778; *King's Adm.* v. *The St. Louis Gas Light Co.*, 34 Mo. 34. But see *Reeder, et al.* v. *Purdy*, 41 Ill. 279.

See also article 4 Am. Law Rev. 429; Tiffany, *Landlord and Tenant*, § 216.

curious and difficult old law of seisin and disseisin, especially of *disseisin by election,* which has puzzled the heads and tried the patience of judges and scholars of later times, and has added its mist to the artificial hindrances of a clear view of the modern law of legal possession; but none of this is of direct practical importance to the modern lawyer, and it has only a remote bearing on the theme of this article. Today, in most jurisdictions there is a single form of action to recover legal possession of land, and this remedy, in most of these jurisdictions, is a descendant of the old action of ejectment of a statutory equivalent for it which colloquially in the profession goes by the same name.

All these remedies by self-help or by action are subject to annihilation by the running of the period of the statute of limitations; and this is the next matter which claims a transitory attention. Frequently one finds statements of judges and other lawyers which seem to confuse the effects of the bar of the statutes of limitations with the effects of prescription in the case of claims of incorporeal rights. They sometimes speak as though statutes of limitations operated to give to an adverse possessor an estate which he did not have before. Furthermore, sometimes it is asserted that the running of the statute transfers the "legal title" from the ousted owner to the adverse possessor. Such statements often proceed from hazy general ideas of the nature and scope of the legal rights, etc. of ousted owner and adverse possessor respectively, of the meaning of *legal title,* and of the full pertinent effect of statutes of limitations. We have already defined, for our present purposes at least, our ideas of legal title, of the rights, etc. of legal possession, and of the effects of a disseisin. Let us clarify our view of this new question by stating emphatically the preliminary axiom that the only immediate purport and effect of statutes of limitations of the common type is *the barring of remedies* after the specified periods. Recalling our case of Smith and Jackson and applying a statute of limitation of the ordinary type, we find that after the specified period has elapsed from the time of the last disseisin of Smith, his remedies to recover the land are gone; but these remedies were all the rights, liberties, and powers that Smith had in or with respect to the land during the continuance of the disseisin. Since they have been obliterated through the operation of the statute of limitations, he has now no legal interest in or with respect to the land. His *title* to have these barred remedies, these rights, etc. constituting his *chose in action,* against possessors of the land, has been vitiated—rendered ineffectual—by the added element of the completed "running of the

statute."[51] Jackson's title to *retain legal possession against Smith* is made effectual by the addition of this new element—the running of the statute of limitations against Smith's remedies to recover seisin; but Jackson's rights, powers, liberties, etc. of presently existing legal possession are not greatly modified or enlarged by this fact. His fee simple estate remains as before. It is now an estate held under *good* title instead of under *defective* title,—i. e. it is no longer subject to the defeasing power of Smith's *chose in action*—but otherwise it is of the same general extent, potency, and validity as before.

Of course, incidentally, Jackson's rights in Y are increased by the fact that an adverse entry on Y by Smith will render Smith liable in trespass to Jackson. Also since Smith no longer has any rights, liberties, or powers with respect to Y—since his title has been vitiated by the running of the period of the statute of limitations against his remedies—Jackson has become seised indefeasibly and may be said to have *the best title*—i. e. good title to hold legal possession of Y against all comers; and therefore if Y is now left unfenced, unused, and unoccupied, the legal possession of Y is in Jackson and not in Smith. In other words, Jackson's title *to the present existence* of legal possession and possessory rights, etc. in his favor no longer depends for its effectiveness upon a continuance of adverse use, occupation, or some legally equivalent control as an element of title.[52] With the exception of this last mentioned fact, neither Jackson's rights, etc. in Y nor his title thereto as against everyone except Smith and persons acting under him, have been in any way enlarged, strengthened, or changed by the running of the statute against Smith's remedies.[53] Jackson now retains legal possession and possessory rights, etc. against all the world including Smith, although he leaves Y vacant, unenclosed, and uncontrolled; but otherwise his rights, etc. and his title thereto were just as complete and effective against adversaries other than Smith before the statute "ran" as they are now.

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[51] "Again, our law knew no acquisitive prescription for land, it merely knew a limitation of actions. Even to the writ of right a limit was set. * * * Thus actions are barred by lapse of time; but acquisitive prescription there is none. On the other hand, we have to remember that every acquisition of seisin, however unjustifiable, at once begets title of a sort, title good against those who have no older seisin to rely upon." 2 Poll. & Maitland, *History of Eng. Law* (2nd ed.) 81.

Hinchman v. *Whetstone*, 23 Ill. 108 (orig. ed. p. 185); *McDuffee, et al.* v. *Sinnott*, 119 Ill. 449; *Hughes* v. *Graves*, 39 Vt. 359.

[52] *Waddle, et al.* v. *Stuart, et al.*, 36 Tenn. (4 Sneed) 534. (Cf. *Hays, et al.* v. *Barrera*, 26 Tex. 79); *Schall* v. *The Williams Valley R. R. Co.*, 35 Pa. St. 191; *School District* v. *Benson*, 31 Me. 381.

[53] A further exception covered by my remarks in note 33 *supra*, should be added. I do not add it in the main text, because I do not wish to dull the point of my argument by irrelevant qualification.

In all this there is nothing to justify a statement that Smith's rights or title have passed to Jackson through the running of the statute. Smith's rights, etc.—i. e. his remedies—have been extinguished by the statute. Jackson certainly has not acquired them. Legal possession in fee simple was not acquired by Jackson in disseisin of Smith by the running of the statute, but by the tortious act which first started that running. Jackson's *title* to whatever rights, etc. he has in Y does not include any of the facts of Smith's former title to his vested fee in Y. Jackson's title is distinct from Smith's and wholly different in its elements. The running of the statute does not enable Jackson to use Smith's title to bolster up his own, by a sort of accretion. Smith retains his title such as it is, but it is now innocuous. It is legally invalid. It gives rise to no legal rights, etc. The running of the statute against Smith's remedies has been added as an element to Jackson's *title* and this addition has made it "the best title" by wiping out the only rights, etc. against Jackson's fee.[54]

Only in a very figurative sense can it be said that *anything* has passed from Smith to Jackson by the running of the statute. Smith's title formerly was "the best title"; now Jackson's is "the best title." The *applicability of the label* has been "transferred" from one to the other. It is evident that in this light figure of speech there lurks a most seductive capacity for such thinking as has not been clarified on the matters covered by this article; and the seduction does not extend merely to cloudiness of perceptions of these matters, but it leads to artificial difficulties in solving legal problems and even to miscarriages of reasoning in some cases.[55]

I have mentioned incidentally the rights, etc. of Jackson against possible adversaries other than Smith, but we hitherto have focused our attention principally on the relative legal relations of Smith and Jackson. Let us now summarize separately some of the facts concerning Jackson's rights, etc. in Y against others than Smith before and after the barring of Smith's remedies.

Before the statute has run against Smith's remedies, Jackson has

[54] "But when the right of entry and the right of action are both lost, it is difficult to perceive what practically remains to the former owner. While the statute has not transferred his title, nor can it have that effect, it does transfer his right of possession, and the title that remains is more in name than in substance." Mr. Justice Walker in *Hinchman* v. *Whetstone*, 23 Ill. 108 (orig. ed. p. 185), at p. 114. Compare the phraseology of the opinion in *Schall, et al.* v. *The Williams Valley R. R. Co.*, 35 Pa. St. 191, at pp. 203 et seq., in the light of the decision in that case. Compare also *Wilkes* v. *Greenway*, 6 Times Law Rep. 449; *Tichborne* v. *Weir*, 67 Law Times Rep. 735; *Re Jolly* [1900] 1 Ch. 292; *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391.

[55] See, for instance, the reasoning of Patteson, J., in *Carter* v. *Barnard*, 13 Q. B. 945, at p. 953-954, and the cases cited in the preceding note.

all the rights, liberties, etc. of a possessor in fee simple.[56] I have previously indicated their general scope. Jackson also has sufficient *title to retain legal possession* against all comers but Smith in litigation. Jackson may be disseised by some new claimant just as he disseised Smith and with similar results. For instance, if James, with intent to appropriate Y for himself, occupies it to the exclusion of Jackson and all other claimants, James acquires a legal possession in fee simple adverse to the claims of Jackson and of Smith. Smith's remedies to recover seisin become remedies against James instead of against Jackson, who has been ousted. Jackson also has similar remedies against James to recover seisin.[57] His title to these remedies consists in the facts establishing (1) his legal possession at the time of James's tortious entry, (2) the disseisin, and (3) the continued adverse possession of James. James's title to retain legal possession is subject to two defects; but as long as neither Jackson nor Smith have recovered seisin from him, the rights, liberties, etc. of a vested fee simple exist in James's favor and not in favor of Jackson nor of Smith. Jackson has a mere *chose in action* to recover possession from James. During James's possession Jackson has no remedies for trespasses committed on Y or for damages done Y by others. James is the man entitled to prosecute claims for such torts. They are legal wrongs against him.

The barring of Smith's remedies by the running of the statute of limitations has no effect upon the relative legal interests and titles of James and Jackson except to free them from the defect of the existence of Smith's prior title and rights, etc. and to cause Jackson's *title to get and hold legal possession* to become by this process of survival, "the best title." Smith's rights, etc. to recover possession from James and the similar *chose in action* of Jackson against James are quite distinct and rest on distinct titles. The running of the statute against one of these interests is quite distinct from its running against the other. Smith's title may be vitiated by the running of the statute before Jackson's is, or *vice versa*. For instance, Smith may be under a disability for many years, during which the statute does not run against his claim although it does run against Jackson's claim, because the case of Smith falls within the scope of an express exception of the statute and Jackson's does not.[58]

Such distinct chains of mutually adverse *titles* to hold or to get

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[56] See, however, note 33, supra.

[57] *Bateman* v. *Allen*, 1 Cro. Eliz. 437; *Tapscott* v. *Cobbs*, 11 Gratt. (Va.) 172; *Gist* v. *Beaumont*, 104 Ala. 347, 16 So. 20; 15 Cyc. 30 et seq.

The statement in *Carter* v. *Barnard*, 13 Q. B. 945, *contra*, was disapproved in *Perry* v. *Clissold*, [1907] A. C. 73.

[58] But compare *San Francisco* v. *Fulde*, 37 Cal. 349.

and hold the fee simple in Y against others may be extended indefinitely.[59] If we realize this fact and add to it an understanding of my previous explanations, we see at once the futility of talking in complete, unspecific, and undefined abstraction about the location of the *legal title* to a piece of land, as though it were a sort of absolute talismanic entity, passing unimpaired from one person to another for causes of various kinds according to fixed legal rules, and entraining by its visitations important legal consequences. We are also able to banish to the limbo of inert fallacies the very frequent assumptions that an adverse possessor has no title or right until the statute has run in his favor, and that adverse possession is of importance to the student of the law of property principally and almost wholly in connection with statutes of limitations.

So far I have used the terms *legal possession* and *seisin* without defining their meaning. The facts and distinctions which I have discussed concern the substance of *the law* itself and their validity and importance are quite independent of the purely linguistic question of the meaning and use of the term *legal possession* or of its synonym *seisin*. Now that we have clarified our views on these matters of the nature of legal property, of titles and their relativity, and of the important distinction between possessory rights, etc. *in rem* in a physical property object and a *chose in action* to recover such rights, etc. when wrongfully withheld by a disseisor or other adverse claimant, we are ready to attack the subordinate but confusing question: What is *legal possession?* To what sort of facts does the term refer in intelligent technical usage?

In the first place *legal possession* of a corporeal property object is not occupation or detention of the object in the ordinary sense of those words. One who occupies or detains land or a chattel as agent or servant of another has no *legal possession* of it.[60] A lodger has no *legal possession,* but is only licensed to *occupy* and use.[61] Even when he has locked the door of his room for the night and put himself in as exclusive physical control of the room as it is possible for one to be, he does not become *legally possessed* of the room. A cropper who sows the land on shares, without a lease, acquires no

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[59] 2 Poll. & Maitl., *Hist. Eng. Law,* (2nd ed.) 46.

[60] "The law would be much simpler than it is if it were held that actual control or custody invariably gives actual legal possession, whether the custodian exercises control on his own account or as the servant or otherwise on behalf of another. But no system of law, so far as we know, has gone that length." Pollock & Wright, *Possession in the Common Law,* 17.

See also *idem* 56-60. *Mayhew* v. *Suttle, et al.,* 4 E. & B. 347; *Mitchell* v. *Davis,* 20 Cal. 45; *White* v. *Bayley, et al.,* 10 C. B. (N. S.) 227. Cf. *Jones* v. *Shay,* 50 Cal. 508.

[61] *White* v. *Maynard,* 111 Mass. 250, 15 Am. Rep. 28. Cf. *Swain* v. *Misner,* 8 Gray (Mass.) 182, 69 Am. St. Rep. 244.

legal possession of the land, although he uses the land and manages the cultivation exclusively, dominantly, and without interference from anyone.[62] The claimant or possessor of an easement, who occupies with some exclusiveness part of X's land or of the space over X's land, under his claim of right, has no legal possession of the land or space so occupied.[63]

It may be objected that although occupancy or detention alone is not legal possession, occupancy and a concomitant specific sort of intent to hold against others do constitute legal possession; and this objection may suffice to distinguish some of my illustrations. It will not distinguish all of them however, as the reader may discover for himself by scanning again the last paragraph in the light of the two that follow; and a candid inquirer must be driven to the conclusion that there is not any specific sort of intent which is universally essential to legal possession, or which is universally efficacious, when conjoined with occupation, to give legal possession.

An infant one year old who has "the best title" to a present legal estate in fee simple in a piece of land, is legally possessed of the land unless it is adversely possessed by another. One may not know of his title to land and may never have seen it and yet be seised of it. Even an *adverse* possessor does not lose his possession in the long intervals when he does not think at all of the land, nor when he does think of it but with no present specific thought of holding it as his own. A land-possessor under good title is possessed of minerals under the land although he has never known of their existence, and although it can be established that he has never meant to claim mineral rights, thinking erroneously that the title to a fee in the minerals was in another. Similarly, a landowner has legal possession of a prehistoric boat or of a lost ring lying under the surface of his land although he has no reason to suspect its presence.[64]

It is difficult to distinguish the intent of the average lodger who agrees to care for her room herself and insists that it be not dis-

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[62] *Hare, et al.* v. *Celey*, Cro. Eliz. 143; *Warner* v. *Hoisington*, 42 Vt. 94. Cf. *Rowlands* v. *Voechting*, 115 Wisc. 352, 91 N. W. 990, 60 L. R. A. 585.

[63] *Hancock* v. *McAvoy*, 151 Pa. St. 774, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781; *Wood, et al.* v. *The Truckee Turnpike Co.*, 24 Cal. 474. See also *Gillespie* v. *Jones*, 47 Cal. 259.

But compare *Tennessee etc. R. R. Co.* v. *East Alabama Ry. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *Hoboken Land etc. Co.* v. *Mayor, etc.*, 36 N. J. L. 540; *Bay County* v. *Bradley*, 39 Mich. 163, 33 Am. Rep. 367; *Beatty* v. *Gregory*, 17 Ia. 109, 85 Am. Dec. 546; *Zander* v. *Valentine Blatz Brewing Co.*, 95 Wisc. 162.

[64] Consider on these points the cases cited in notes 29, 40, 41, and 42, supra: *Lewey* v. *Fricke Coke Co.*, 166 Pa. St. 536; *South Staffordshire Water Co.* v. *Sharman*, L. R. 1896, 2 Q. B. D. 44; *Elwes* v. *Brigg Gas Co.*, L. R. 33 Ch. Div. 562. (Cf. *Durfee* v. *Jones*, 11 R. I. 588; *Bowen, et al.* v. *Sullivan*, 62 Ind. 281.)

Also compare 2 Poll. & Maitland, *Hist. Eng. Law*, 54, especially note 2.

turbed or entered in any way during her absence, and the intent of the average tenant at will of a furnished house, assuming that neither knows anything about the law. If the lodger had taken a lease of her room at the solicitation of her landlady, as a matter of course and without realization of the legal difference, she would have become legal possessor of the room. Would anyone seriously argue that some actual difference in her intent with respect to her use and occupation or control of the room would be responsible for this material change in her legal rights, etc? Of course some who enjoy indirect language may assert that her intention to possess would be "conclusively presumed" from the acceptance of the lease; but this evidently is a fictitious assertion. It means that her actual intent would be irrelevant to the legal question involved. If legal possession is given in any case irrespectively of actual specific intent, it is plain that in that case actual specific intent is not an essential element of legal possession; and we should not allow any sort of verbal hocus pocus to blink this fact. Again, what material difference is there between the actual intent of a cropper who exclusively uses land for raising a single crop on shares and that of a lessee at will by parol who agrees to render part of the crop as rent, when, as is not uncommon, neither knows anything about the law on the point, nor suspects the possibility of a technical distinction between the two sorts of cases, nor considers at all the nature of the legal relationship into which he is entering except that he knows that he has "made a contract"; nor evidences curiosity or thought as to just what his rights and liberties with respect to the land amount to legally? What material difference is there between the *actual* intent of a law-ignorant bailee at will of a chattel for storage and that of an equally unknowing servant who is given custody of a chattel to keep for his master? Would direct overwhelming evidence that the servant's intent was exactly similar to those of bailees at will for storage in general be admissible to establish that he was bailee with legal possession of the chattel and not a non-possessing custodian?[65] What material difference is there between the actual intent and purposes of a servant who is given a small cottage on a corner of his master's estate, for the exclusive use of himself and his family, as one of the perquisites of his employment, and that of a tenant at will, perhaps a pensioner, in a similar neighboring cottage?[66] Even

[65] "A servant who is carrying his master's goods can not become a possessor of them by merely forming the intent to appropriate them. If we say that he must be supposed to have an honest intent until by some act he shows the contrary, we are introducing a fiction." 2 Poll. & Maitl., *History of English Law*, 35, note.

[66] Compare *Bertie* v. *Beaumont*, 16 East (Eng.) 33 and *Jones* v. *Shay*, 50 Cal. 508. "But, in truth, the exception with regard to servants stands on purely historical

the negro slave, no doubt, thought of his hut as a private home, appropriated and held with some exclusiveness; but no matter how insistently he might assert ownership, he could acquire no legal possession.[67] Lawyers, saddled with knowledge of legal technicalities and distinctions, may be driven and harassed by perplexities into a nice discrimination of legal relationships, but the average layman thinks no more of such matters than practical necessity compels. He undertakes no fine analysis and adjustment of his motives in accord with some categories of legal technic, but responds with alacrity to the prospect of concrete material benefit.

But we can further embarrass *a priori* theories. Even occupancy or detention is not universally essential to the existence of legal possession of a physical property object. The owner of vacant unused lands *prima facie* is legally possessed of them. There may even be considerable adverse (i. e. tortious) use of the land by others without a disseisin of the owner who is not himself using the land in any way.[68] Furthermore, a disseisee who still retained his right of entry, might revest his seisin at common law by merely entering on a corner of the land in open assertion of his claim, without disturbing in any way the adverse occupancy; and under certain circumstances he could revest his seisin by making his claim "within view" without an entry.[69] One who occupies *adversely* only part of a tract of land of ordinary size under written color and claim of title to the whole tract, leaving the rest of the tract vacant, unused, and unenclosed, may have adverse legal possession of the vacant part as well as of the occupied part.[70] *Adverse* possession may be acquired and continuously maintained with very slight or very broken use or control of the land, as, for instance, by building a substantial fence around it; or by cultivating it during the ordinary seasons and letting it lie unused and unenclosed during the rest of the year; or by pasturing cattle on it; or by cutting firewood from it at intervals; or by entering at intervals and taking turpentine from trees on the land, which is of little value for other purposes; or by taking sand from

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grounds. A servant is denied possession, not from any peculiarity of intent with regard to the things in his custody, either towards his master or other people, by which he is distinguished from a depositary, but simply as one of the incidents of his status." Holmes, *The Common Law*, 227-228.

[67] *Brandon* v. *Huntsville Bank*, 1 Stew. (Ala.) 48; *Mitchell* v. *Wells*, 8 George (Miss.) 235.

[68] See cases cited in note 29, supra; *Tracey* v. *N. W. R. R. Co.*, 39 Conn. 382 *Knight* v. *Denman, et al.*, 64 Neb. 814, 90 N. W. 863.

[69] Litt. sec. 419; Co. Litt. 252a-254b.

[70] *Murphy* v. *Doyle*, 37 Minn. 113, 33 N. W. 220; *McColman* v. *Wilkes*, 3 Strob. Law (S. C.) 465, 51 Am. Dec. 637; *Waddle, et al. v. Stuart, et al.*, 36 Tenn. (4 Sneed) 534; *Hays, et al.* v. *Barrera*, 26 Tex. 79.

a vacant lot from time to time and warning others off. Indeed, the line between what will and what will not be sufficient use or control to produce, when combined with the proper sort of intent, legal possession by way of disseisin, is not easy to draw by a single comprehensive abstraction. I doubt whether any neat definition of "detention" could be devised which would answer the purpose adequately.[71] Furthermore, an adverse possessor remains seised during the short intervals between the departure of one tenant and the entry of the succeeding tenant; and there have been cases where it has been held that *adverse* legal possession had continued without interruption during a series of years when the land was unused and the buildings were in ruins.[72] We may add for good measure that the minerals under a piece of land may be legally possessed by one who has no interest in the rest of the land, which is occupied and legally possessed by another, although the minerals have not been explored or worked and their possessor does not know where or to what extent they exist.[73]

What then do we mean by *legal possession?* What is the legal *hold* on the land or chattel to which this term refers? Search as we will, we shall find no element or set of elements which is universally present in situations to which the term is applied, and universally absent when legal possession is denied, except those possessory legal rights, etc. which make the term of technical importance. Whenever it is held that legal possession of certain land exists in X, it is held that X has legal rights and liberties in the land of the sort which I have hitherto indicated roughly by the term *possessory rights,* etc. Whenever it is held that Y has not legal possession of certain land, it is held that he has not possessory *rights* of this sort. The presence of these rights, etc. in X gives him, metaphorically speaking, a present legal *hold* on the land which Y has not because he lacks such rights. Is it not true, then, that when a judge or other lawyer asserts that legal possession exists in favor of X, or does not exist in favor of Y, he really means to assert that X has legal possessory rights, etc. or that Y has them not? It may be that he is not conscious of the exact purport of his terminology and uses it with the instinct of habit without clear definition. It may be that he blurs his own per-

[71] *Gray* v. *Collins,* 42 Cal. 152; *Hussey* v. *McDermott,* 23 Cal. 413; *Murray* v. *Hudson,* 65 Mich. 670, 32 N. W. 889; *Branch & Thomas* v. *Campbell,* 52 N. C. (7 Jones) 378; *Ewing* v. *Burnett,* 11 Pet. (U. S.) 41, 9 L. ed. 624; *Brumagim* v. *Bradshaw,* 39 Cal. 24.

[72] *Downing* v. *Mayes,* 153 Ill. 330, 46 Am. St. Rep. 896; *The Susquehanna etc. Co.* v. *Quick,* 68 Pa. St. 189; *Cunningham* v. *Patton,* 6 Pa. St. 355; *Ford* v. *Wilson,* 35 Miss. (6 George) 490.

[73] *Catlin Coal Co.* v. *Lloyd,* 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Plummer* v. *Hillside Coal & Iron Co., et al.,* 160 Pa. St. 483; *Davis, et al.* v. *Shepherd,* 31 Colo. 141, 72 Pac. 57.

ception of the import of his statements by confusing the non-legal facts of occupation with the legal effects which, he decides, accrue in X's favor, and which, subconsciously determine his use of the label. Such a confusion is not strange; for amid abundance of talk of legal rights and duties, relatively few lawyers have a clear conception of the nature of legal rights and duties, and many would be hard put to it to point definitely to the substance of a legal right if cross-examined by a discriminating enquirer.

The nature of legal property is not easily perceived by the average student of the law, but becomes clear to him only after considerable study. Continually he confuses conceptions of non-legal facts, such as land, chattels, the use and enjoyment of physical property objects, or a contractual agreement, and technical legal things—legal rights, duties, etc.—such as a fee simple estate in land, an easement, a term for years in land, the general property in a chattel, or a contract obligation.[74] When we add to these consid-

[74] "A case like this" (i. e. *Bridges* v. *Hawkesworth,* 21 L. J. Q. B. 75, 15 Jur. 1079) "illustrates the importance of grasping the preliminary conception of facts, and of keeping it clear from the supervening questions of right." Pollock & Wright, *Possession in the Common Law,* 40.

"Legal possession is altogether the work of the law. * * * To have physical possession of a thing is to have a certain relation with that thing, of which, if it please the legislator, the existence may hold the place of an investitive event, for the purpose of giving commencement to certain rights over that thing. To have legal possession of a thing is already to have certain rights over that thing, whether by reason of physical possession or otherwise." From Bentham's introduction to his translation of Savigny on Possession, as quoted in Pollock & Wright, *Possession in the Common Law,* 67.

Another similar confusion of ideas of non-legal things and legal consequences which sometimes are associated with those things, occurs in dealing with problems of deliveries of deeds.

A deed is put into effect between the parties to it only when it has been *delivered.* The *delivery* which is essential, is not a physical tradition, although a physical tradition often accompanies a delivery and sometimes constitutes an important element in the grantee's *title* to the legal consequences of a *delivery.* A *delivery* may occur although the grantor never for a moment yields his custody of the deed. What is essential is that he should give up his legal possessory rights, etc., of control over the deed and that the grantee should acquire such rights, etc., in the deed.

In the case of deposits in escrow, this result is accomplished in full only after the condition of the deposit has been performed, although, in some cases, the initial deposit results in depriving the grantor of his rights, etc., of control to the extent involved in the valid escrow condition and invests the grantee with the *legal* power or possibility of acquiring full *legal possessory rights,* etc., in the deed through the occurrence of the condition of the escrow deposit. Neither the deposit of the "deed" in escrow nor the tradition of it from the depositary to the grantee upon performance of the condition, nor both constitute the *legal delivery.* In fact the transmission of the physical document to the grantee is not essential to its operation. The essential substance of the *legal delivery* is that the grantee acquire legal possessory rights in the deed, analogous to those of a proprietor of a chattel, who is either in immediate legal possession or in the situation of a bailor. This is, in legal jargon, a matter of operation of law and not of non-legal fact. The deposit in escrow, its terms, and the performance or occurrence of the condition are non-legal facts upon which, as title, depend the legal consequences that constitute the delivery—i. e., the investment of the grantee with legal possessory rights

erations, the facts that *possession* as a word of popular speech means frequently occupation or detention, and that occupation or detention frequently is a necessary element of title to a certain vested legal possession of land or a chattel, and that the *legal* significance of the word is a metaphorical extension of its primary popular meaning, it should be clear that hopeless confusion of the familiar commonplace idea of occupation or detention and the technical unanalyzed notion of *legal possession,* to the detriment of the latter, is not only natural, but inevitable in uncritical minds.[75]

If I am right in my conclusion that *legal possession,* when used with reference to a physical property object, is applicable technically to the sort of legal rights, etc. which have been called *possessory rights* in this article, the term is one of considerable value in our technical vocabulary. It serves to distinguish the possessory rights, etc., in land or a chattel from the lack of such rights, etc., from the *chose in action* of a disseisee, from easement rights, etc., and from contingent "rights" and possibilities. I trust that I have made the

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in the deed. Because frequently physical tradition of the deed to the grantee or someone for him is associated with such a *legal delivery* and is an important matter, at least of evidence, of the title upon which the legal *delivery* depends, these legal consequences and the physical act of tradition have been confused to such an extent by judges and text writers that the law of *delivery* of deeds is one of the most difficult and puzzling quagmires through which a student flounders.

Here, again, the fundamental cause of the trouble is that, to many lawyers and students, legal rights and other legal incidents are unfamiliar phantoms and not analyzed realities, and therefore they do not habitually and easily distinguish matters of non-legal fact, which may or may not be important as elements of title or of evidence of title (evidence in the sense of a basis for inference and not in the technical sense of testimony, etc., before a tribunal), and such legal consequences as *legal possession,* a contract *obligation,* and the *legal delivery* of a deed.

[75] "The idea of seisin seems to be closely connected in our ancestors' minds with the idea of enjoyment." 2 Poll. & Maitl., *Hist of Eng. Law,* (2nd ed.), 34.

See also *idem,* 124 *et seq.*

"When we say that seisin is possession, we use the latter term in the sense in which lawyers use it, a sense in which possession is quite distinct from, and may be sharply opposed to, proprietary right. In common talk we constantly speak as though possession were much the same as ownership. When a man says 'I possess a watch', he generally means 'I own a watch'. Suppose that he has left his watch with a watchmaker for repair, and is asked whether he still possesses a watch, whether the watch is not in the watchmaker's possession, and if so whether both he and the watchmaker have possession of the same watch at the same time, he is perhaps a little puzzled and resents our questions as lawyers' impertinences. Even if the watch has been stolen, he is not very willing to admit that he no longer possesses a watch. This is instructive:—in our non-professional moments *possession* seems much nearer to our lips than *ownership.*" 2 Poll. & Maitl., *Hist. of Eng. Law,* (2nd ed.), 33.

"The process by which words are specified, by which their technical meaning is determined, is to a first glance a curious, illogical process. Legal reasoning seems circular:—for example, it is argued in one case that a man has an action of trespass because he has possession, in the next case that he has possession because he has an action of trespass; and so we seem to be running round from right to remedy and then from remedy to right." 2 Poll. & Maitl., *Hist. of Eng. Law,* (2nd ed.), 31.

See also Holmes, *The Common Law,* 246.

substance of these distinctions sufficiently apparent.[76] Adopting this meaning of *legal possession* of land or of a chattel, we can say that X is *legally possessed* of the object whenever we wish to convey the idea that he has legal possessory rights, etc., *presently existing in his favor.* Legal possession of a physical object of property may exist in favor of X by virtue of any of various sorts of titles; and none of these various sorts of titles is determined by linguistic definition or by *a priori,* abstract reasoning, but by practical juridical considerations of justice and policy including custom, precedents, etc., etc., such as have produced a large proportion of our law. If this is the nature of legal possession, it in no way offends logic or shocks common understanding to hold and say that X is legally possessed of land which he has never seen and which Y occupies and uses exclusively; to deny to a servant legal possession while giving it to a subservient, unassertive bailee at will; to deny a dominating exclusive lodger legal possession while giving it to a submissive pensionary tenant at will; to give legal possession of unknown minerals to X, who denies that he has or claims any right, title, or interest in them if they should exist; to give even to a disseisor legal possession of a physical object when he has no present physical contact with the object or physical control over it;[77] for the question is not whether

[76] It is now and then suggested by some who casually rub elbows with the puzzles of the law of possession and its terminology, that *possession,* as a technical term, should be used only to designate certain sorts of non-legal facts, and that when pertinent legal rights, etc., are referred to, the phrase *right to possession* or *right of possession* should be discriminatingly employed. The futility of this suggestion soon becomes apparent to an investigator.

At the outset we have the difficulty of fixing with certainty the non-legal elements to which *possession* as a technical term is to be applied. Where shall we draw an arbitrary line between those metaphorically extended meanings of the word which fall within the range of this technical application and those which fall without? How shall we cover and distinguish all the various sorts of things to be labeled *possession* technically by a single neat definition? But this is only the beginning of our difficulties. What in the name of precision do we mean by *right to possession* or *right of possession?* Do the two terms mean the same or different things? Do we mean that mass of rights, etc., which I call *possessory rights,* constituting a *vested* estate in land or a corresponding *vested* interest in a chattel? Or do we mean the defensive legal powers of the holder of such an interest against X, Y, or Z, (although, not perhaps against A or B) who may seek to get it from him by legal process? Or do we mean the valid *chose in action* of P to recover such possessory rights, etc., which are held adversely by another? Or do we mean the legal *liberties* to *use and occupation* which a legal possessor, or a holder of a sufficient easement, or a licensee for the purpose may have? Or do we mean a *chose in action* to enforce a valid claim to *occupy* or *use* the property object which may accrue because of any of various sorts of titles? Or do we mean the valid title on which one or another of these various sorts of legal interests depends?

[77] To cases where X has legal possessory rights, etc., in a physical object, but no facts exist which can be brought under the label of *X's occupation* or *detention,* even by an elastic stretching of their meanings, the term *constructive possession* or, sometimes, *possession in law,* is applied. It may be argued by some that the predication that *legal possession* exists in X in these cases is a fiction and that consciousness of this fiction is

the non-legal facts accord with some preconceived abstract conception, but whether they furnish considerations sufficiently strong, when applicable precedents and legislation are thrown into the scales, to induce the courts to adjudge that the present existence of possessory rights, etc., was in the claimant. We may, perhaps, differ legitimately from decisions of courts concerning possession in particular cases, but our differences should be based on grounds of practical juridical policy, and not on the ground that some abstract preconceived physical detention conception of possession is irreconcilable with the decision.[78] Viewed in this light, the reason becomes clear

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reflected by the occasional use of the epithets *constructive* and *in law*. This *explanation* is untenable, however. It is evident that something real is referred to by *constructive possession*, and that this something is similar to the important incidents implied by the use of the term *legal possession* without the qualification. If it be said that what is meant is that possessory rights, etc., exist in X in cases of *constructive possession* although X has no occupation, whereas normally occupation is the basis for the existof such rights, etc., there is an admission that these possessory rights, etc., are the essential objects to which the term *possession* in its technical sense refers.

It is erroneous, however, to assume that normally rights, etc., of this sort rest on occupation or some physical control as an element of title. They do not depend on occupation or detention of the physical object, except in cases where questions of adverse possession are involved, and not always even in such cases. Nor does occupation, even when accompanied by a dominating intent, necessarily imply *legal possession*. Rightful title to hold a legal estate in the land or a possessory interest in the chattel against others, independently of occupation, is a more normal basis of title to the present existence of legal possessory rights, etc., than is occupation. Admittedly in these cases of so-called *constructive possession*, excepting a few sorts to which the term *possession in law* has been applied by careful writers from early times, possessory rights, etc., exist irrespectively of any occupation of the part of the land or of the chattel in question. If X goes into occupation, his occupation does not become an essential element of his title to these rights, etc. Nevertheless, if he does go into occupation, his legal possession is no longer called *constructive* by anyone.

In view of these facts does not the following explanation of this usage appear to be correct? Legal possession is as real in the cases of *constructive possession* as in other cases. When, however, nothing tangible exists in favor of X to which the term *possession* in its non-technical senses can be applied, those whose ideas of the nature of legal rights, etc., and of the relations of facts as elements of title are not clear and definite, or whose notions of *legal possession* and of occupation are unanalyzed and confused, and who have not followed perceivingly the shifting meanings of the word *possession* are misled into assuming that "the law" is indulging its tastes for fictions again; and therefore they apply the epithet *constructive* to brand the aberration. The aberration is not that of the law, but of the unscientific observer, and is similar to the quite common confusion of ideas which results occasionally in a classification of rights, etc., into "those arising out of the agreement of the parties" and "those arising by operation of law."

Careful writers have advocated that the use of the term *possession in law* be confined, in accordance with the usage of the earlier authorities, to cases where the "possessor" is given only specific limited sorts of remedies of legal possession, and not the full status of legal possession. (See Pollock & Wright, *Possession in the Common Law*, p. 27.) In such cases it would carry a distinctive meaning of legal importance.

[78] A stick of wood is washed onto X's land by the tide. Independently of the law, may X be called *possessor* of the stick? A roll of bills are in a pile of rags which Y has purchased and placed in his factory. Y does not know of the existence of the

why, even when X has occupation of a chattel or of a piece of land and expresses an intent to assert the exclusiveness of his control against everyone, it is necessary to know something of the circumstances and title under which he came into occupation before we can decide conclusively that he has legal possession.[79]

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bills. Independently of the law, may it be said that he *possesses* the money? A ring has been lost by an unknown owner in a pool of water on Z's land and lies embedded in the mud at the bottom of the pool. Independently of law may Z be called the *possessor* of the ring? A roll of bills is in a secret drawer of a safe. L, the owner and possessor of the safe, has bought it second hand and knows nothing of the bills. May L be said to *possess* the bills? A forgetful customer leaves his wallet on a table in a barber shop. May the barber be called the *possessor* of the wallet before he sees it?

There is nothing cryptic about these questions. They concern the limits of permissible elasticity in the imaginative use of a word. Is there any sense in which the term *possess* can be applied? If there is, what is that sense? These are the questions implicated in each of the cases which I have mentioned, and they are questions of language simply. The questions whether or not X, Y, Z, L, and the barber are entitled to possessory rights, etc. in the property objects respectively (and therefore would be called *legal possessors* in technical speech) are quite distinct and turn on considerations other than those of popular or scientific terminology.

[79] The argument for those who oppose a definition of the term *legal possession* which would make it applicable exclusively to a certain sort of legal interest when used with respect to a physical property object, is put ingeniously by Mr. Justice Holmes in *The Common Law,* at pp. 213-214.

If it were true, as Justice Holmes apparently assumes, that a constant group of abstracted elements can be ascertained, which always are causative of the existence of legal possessory rights, etc., and that legal possessory rights never occur as consequences of facts from which these defined elements are lacking, his explanation would be cogent; but this premise is untrue. The various sorts of titles to the present existence of legal possessory rights, etc. in a claimant cannot be harmonized into any uniformed set of abstracted elements. If Jones has acquired the "best title" to a present estate in fee simple in X and X is not adversely possessed, Jones has legal possession of X although X is unoccupied, unused, and unfenced. Jones is legally possessed under our modern American law although neither he nor any one representing him ever has been within sight of X and even though he does not know of the existence of X or of his title to it. For instance, he may be devisee of X under a will of which he knows nothing; or he may be transferee by a deed of conveyance delivered to a third person as custodian for Jones. Even if Jones takes occupation of the land, that occupation does not become an element of his title to legal possessory rights, etc., excepting insofar as the range of possible torts against legal possession is increased by the fact of Jones's occupation. Specific tortious nuisances may be possible against Jones's use which were impossible when the land was vacant; but the legal possessory rights, etc. of Jones, primarily, and to a great extent exclusively, still are "legal consequences" of the facts constituting his "best title" to the fee simple. Neither occupation nor intent on his part to exclude others fills any essential office among the basic elements of his title to legal possessory rights, etc.

If objection be raised to my illustrations that Justice Holmes's statements pertain only to freshly initiated titles to legal possession and not to derivative titles or titles by succession, let me meet it by suggesting cases of newly patented land which has never been occupied, used, or entered upon, by a legal possessor, and of a newly born calf whose mother has been roaming the public range for months beyond the ken of its owner and legal possessor.

Compare also *Swift* v. *Gifford,* 2 Lowell 110; *Fennings* v. *Lord Grenville,* 1 Taunt. 241; *Littledale, et al.* v. *Scaith, et al.,* 1 Taunt. 243n.

Furthermore, while generally some use, occupation, or legally equivalent physical

A few additional facts may be stated to lend whatever persuasive force they have to my argument. One may be *legally possessed* of *legal rights,* etc. Now these are technical legal things and not unitary physical objects which can be occupied or physically detained. One *possesses* a legal right or other legal interest when he can exercise it presently upon occasion—e. g. when, in the case of a *right,* he may successfully maintain a suit presently if an infringement takes place; or in the case of a legal liberty, he may act presently in accordance with the liberty without legal liability. Legal rights, etc. of course may be possessed by their "owner"; but many sorts may also be *adversely possessed*—i. e. possessed tortiously against one who has good title to recover possession of such rights against the adverse possessor. If the rights, etc. in question are elements of possessorship of a physical property object, this is evident. Disseising adverse possession of the property object is constituted by adverse possession of these possessory rights and deprivation of the owner of the power to exercise these rights, etc. Even some incorporeal rights, etc. may be adversely possessed, however. For instance, an easement appurtenant to possessorship of a piece of land passes with the possessory rights in the land to a disseisor as an incident of legal possession of the land. The disseisee loses it for as long as the disseisin continues. It is usual to speak of easements being appurtenent to *ownership* of the dominant tenement; it is more correct to say that they are appurtenant to *possessorship* of the dom-

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control of the property object by the adverse claimant or a proxy is an essential element of good title to *adverse* legal possession, and generally an adverse appropriation intent is essential to *initiate* a disseisin, the sorts and degrees of use or control which will suffice to give an adverse claimant legal possession depend on various circumstances—e. g. the nature of the land and the variety of possible uses, the existence, or non-existence of adverse use or occupation by others, and the presence or absence of formal color of title—and try as we will, we cannot make these dissimilar sorts look alike to the critical eye by dressing all in the same cleverly trimmed linguistic habits.

When in addition we recall that although occupation and a dominant intent are both established in X's favor, yet if X's occupation was that of a servant, or lodger, or cropper without a lease, or holder of an easement, he is denied legal possessory rights —when we realize what a part legal relationships and their obligations, and agreements and conveyances and their construction play in the determination of this matter of legal possession—Justice Holmes's suggestions lose their persuasiveness.

The passage criticized does, however, clearly call attention to the important distinction between rights, etc. of legal possession and the facts constituting a title to such rights, etc., and to the slipping tendencies of language which cause the same word *possession* to be applied to each distinct sort of thing.

Compare the following additional passages from the same book:—pp. 215-216, 235-236; 238-239.

Indeed, I could offer no more convincing authority in support of various tenets of my thesis and as witnesses against the validity of the particular suggestion which I have criticized than the perspicuous and accurate remarks on the topic registered in this instructive book.

inant tenement, since a tenant for years or a disseisor is entitled to enjoy them as against the possessor of the servient land and others.[80]

In the law of the thirteenth century, seisin and disseisin of incorporeal interests played a great part; and it is curious that here also we find traces of confusion of the idea of corporeal occupation and the growing feeling of legal seisin, which resulted in importing into the law of incorporeals an artificial necessity of some outward physical act with respect to enjoyment of the benefits of an incorporeal, as a fanciful analogue of entry on land, before a vendee of it could be considered legally seised.[81]

Finally, a reversioner or a vested remainderman is *seised* of the land in reversion or remainder; and a bailor of a chattel *in the modern law,* has also a sort of legal possession. At least the reversioner or remainderman in fee simple and the bailor have rights, etc. in the land or chattel against the world in general which are dissimilar to a mere chose in action. They have not what, for want of a more accurately discriminating term, may be called the *present* legal possession, it is true; but they have possessory rights, etc. *in rem* in protection of their prospects of future enjoyment of the property object.[82] At some later time I may find leisure to discuss

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[80] 2 Poll. & Maitl., *Hist. Eng. Law,* (2nd ed.), 124, 140-149.

"Services and rent, then, were, and to some extent are still, dealt with by the law from the point of view of property. They were things which could be owned and transferred like other property. They could be possessed even by wrong, and possessory remedies were given for them." Holmes, *The Common Law,* 390. See also 1 Co. Rep. 122b.

To effect that a disseisor is entitled to an easement appurtenant, see also dicta in *Chudleigh's Case,* 1 Coke, 122b; *Norcross* v. *James,* 140 Mass. 188, 2 N. E. 946, per Holmes, J.; *Morton* v. *Thompson,* 69 Vt. 432, 38 Atl. 88. Holmes, *The Common Law,* 381 et seq. Consider also *Mellington* v. *Goodtitle, Andrews' Rep.* 106.

[81] 2 Poll. & Maitl., *Hist. Eng. Law,* (2nd ed), 124-149; 80-106. Holmes, *The Common Law,* 409.

[82] 2 Poll. & Maitl., *Hist. Eng. Law,* (2nd ed.), 35-40, 125-129; Challis, *Real Prop.,* 77, c. 11; 1 Leake's *Digest of Law of Property in Land,* 320; Co. Litt. 49b, 143a; 2 Bl. *Comm.* 166; *Whitaker* v. *Whitaker,* 12 N. C. (1 Dev. Law) 310; *Farina* v. *Home,* 16 M. & W. 119 at p. 123; Holmes, *The Common Law,* 171-175; Gray, *Perpetuities* (3rd ed.) § § 789 et seq.

To speak of a reversion or a remainder as *vested* is to use language familiar to every student of the law of future interests. It is quite commonly recognized that the term *vested* in this connection means invested with seisin. If such traditional and prevalent phraseology is anything more than a shibboleth of pedantic lore, its meaning should be at least approximately ascertainable. On the basis of its latter day use, the historical learning that is available, and the analogies of the use of *seisin* and *vested* in connection with "present" interests, one can presume with some confidence that the *vested* attributes of a reversion or remainder consisted in the legal remedies and powers of the holder of the interest as compared with the deficiencies in this respect of a contingent interest or a *chose in action.*

In our modern law, the interest of a bailor of a chattel, with regard to the scope of his legal remedies, is roughly analogous to that of a reversioner in the case of land; and if our technical language is to be controlled by logic, I see no reason for refusing to say that a bailor for a term is *possessed in reversion.* However, it must be admitted

further this important and interesting matter of the legal seisin of a holder of a future estate in land and of the somewhat analogous possession of a bailor for a term in a chattel. It would involve a careful historical survey as well as an analytical study of present day law. Therefore, I now hold my peace. My present purpose has been fulfilled and I shall detain the attention of such of my readers as are interested only for the perusal of a briefly stated outline of my ideas concerning the proper content of a case-method introductory course to property law.[83]

If I am correct in my analysis, it should be clear that these ideas of the nature of legal property; its relation to physical objects of property which are not technical legal things; of titles, their relation to rights, etc. and their relativity in other respects; of legal possession; and of the important effects of disseisin, are the very primary

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that although the term *possessed* has been used at times with reference to the legal position of a bailor, commonly the term is confined to the meaning of "present" legal possession when it is used in the technical sense in connection with discussions of property in chattels.

[83] Several miscellaneous statements may be added here for whatever light they may shed on possible doubts.

Actual possession is used in technical discussions with various shades and shadows of meaning. Sometimes the modifier *actual* intimates only that *possession* is used in a non-legal sense. Sometimes *actual possession* means some sort of physical occupation or detention. Sometimes it is given a more or less vaguely specific definition. Sometimes it is used to indicate *legal possession* accompanied by occupation or some physical equivalent; and sometimes it means *present* legal possession as distinguished from legal possession subject to a preceding estate or lesser possessory interest. See *Carpenter* v. *Garrett*, 75 Va. 129, 135; Poll. & Wright, *Possession in the Common Law*, 27; Bridgman, C.J., in *Geary* v. *Bearcroft*, Carter 57 at p. 66. Compare *Lofstad* v. *Murasky*, 152 Cal. 64, 91 Pac. 1008.

I have commented on *constructive possession* in note 77, supra.

Seisin was originally a coextensive synonym for *possession* in technical speech; but in the sense of *legal possession*, it was confined, in time, to a more limited technical significance. See 2 Poll. & Maitl., *Hist. Eng. Law*, (2nd ed.) 29-33; Co. Litt. 17a. *Seisin* came to mean legal possession by virtue of an estate or interest of freehold duration. This specific meaning it acquired through its use in connection with the possessory assizes, which were brought to recover seisin, were founded on the allegations of a past *seisin* in the plaintiff or his ancestor, and were available only to freehold claimants. The tenant for years, who was not entitled to the assize, was said to be *possessed* and not *seised*. His *possession* was vindicated by the writ of trespass and later more completely by a specialized form of this writ, the *de ejectione firmae*. 2 Poll. & Maitl., *Hist. Eng Law*, (2nd ed.) 106-110.

It should be noted that remedies which in form purport to be designed for the recovery of possession, are used often when there has been no loss of legal possession by plaintiff. He may elect to consider himself dispossessed or disseised in order to avail himself of the remedy. In many cases of mere trespasses, therefore, the court adjudges that plaintiff shall recover possession; and in order that we be not misled and confused in our ideas of the law of legal possession, it is necessary that we bear this fact in mind. Indeed, much of the most difficult part of the old law of seisin and disseisin owed its intricacies to this doctrine of disseisin by election. See 2. Poll. & Maitl. *Hist. Eng. Law*, (2nd ed.) 53-54; Britton, I, 154 et seq.; Nichol's translation, Legal Classic Series ed. pp. 316 et seq.; Co. Litt. 330b, Butler's note 1.

Compare: *Zander* v. *Valentine Blatz Brewing Co.*, 95 Wisc. 162.

pedagogical elements of property law. They are elementary in the same sense that offer and acceptance and consideration are elementary ideas of contract law. Here then our study of property should begin—not, however, in analytical abstraction, but in studying and perceiving these important facts and distinctions in concrete operation in past recorded cases, so that they may become familiar and recognized realities of our professional life. Before we finish this case-study of the law of vested legal possession, we should get well rounded ideas of the scope of the rights, etc. *in rem* of a legal possessor of land, including among other matters in this wider range the definition of his rights, etc. which Professor Gray indicates by the cases in Vol. II of his case books on property law under the heading *Natural Rights*. Next we may take up logically remedies to recover possession of lands adversely held; then the study of adverse possession and the relative validity of mutually adverse titles respecting possessory rights in the same piece of land; then naturally we pass to statutes of limitations and their effects; then we may study incorporeal rights of use, etc.—i. e. rights of use not amounting to legal possession, but in partial derogation thereof—and the law of prescription; then naturally comes a study of the relationship of landlord and tenant, in a concrete and modern atmosphere, and as much of the detailed law of landlord and tenant as is deemed advisable, including the law of covenants in leases and tenants' fixtures. If these topics are well handled, in my judgment they should leave the student undrugged by obsolete learning and technicalities, and with a sound foundation on which to build an understanding of the common law system of estates in land; for at the very core of the apparently rhymeless law of estates lie the fundamental elements of legal possession and the relationship of landlord and tenant; and these elements are neither obsolete nor anachronistic survivals, but modern as well as ancient things—things with which our daily professional life brings us into contact, and therefore things which it should teach us easily to understand. A few important topics, which I need not stay to discuss here will serve to round out a coherent, logically progressive and fundamental first course in land law.

As to the law of chattels, a great deal of it that is analogous to the law of land might be taught in connection with various of the topics which I have outlined. The analogies are more numerous and closer than is usually assumed. As for the rest of the law of chattels, much is relatively unimportant, infrequent law; and there are courses on *sales,* on *bailments,* on *torts,* on *trusts,* on *mortgages* and *liens,* and on *future interests.*

The second course in property should be one on the methods of creating, "transferring," "assigning," and extinguishing *inter vivos* interests in land, including also such topics as restraints on alienation, fraudulent conveyances, recording, covenants for title, construction of deeds, etc. The third course should be one on the law of wills, intestate succession, and administration; and the fourth should be a course on future interests.

This in briefest fragmentary outline, is my tentative scheme; and in all except the composition, and arrangement of topics and emphases in the introductory course, it differs little from the offerings of some of our present law curricula. There is much more that I should like to say in amplification and addition; but experience and not the pelting of discourse is the sounder arguer. Therefore, I am content to wait in patience for a wider test to drive home my points more eloquently than I have done here.[84]

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[84] Professor James Barr Ames in his article on *The Disseisin of Chattels* in 3 Harvard Law Rev. has summarized much of the law and presented a very substantial part of the theme covered by this article with his usual clearness and effectiveness. It has given me confidence in my conclusions which I might otherwise have lacked, to have checked and directed them by his historical skill and philosophical insight. Indeed, I even venture to infer that had Mr. Ames undertaken the preparation of an introductory case-book on property law, his theory of "the nature of ownership" and the law of possession would have been its motif. Indeed Professor Gray, in his careful collection of cases, introduces the student early to some of the law of possession and emphasizes its importance by the recurrence of fragments of it at intervals throughout his six volumes.

Of course, it hardly is necessary to say that all students of the common law of possession owe much to the historical learning of Mr. Frederic W. Maitland, of Sir Frederick Pollock, of Mr. Robert S. Wright, and of Mr. Justice Holmes.